Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-118

PACIFIC ENGINEERING & PRODUCTION CO. OF NEVADA,
Petitioner,

v.

KERR-McGEE CORPORATION AND KERR-McGEE CHEMICAL CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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conclusion during a fourth year. (App. 63-64.) The district court also found that respondent had the power to control the price for A/P; it observed that respondent had already demonstrated power to *lower* prices by the predatory pricing on which it was held to have attempted to secure a monopoly; the court also concluded that respondent possessed power to *raise* prices for A/P solely on the strength of the testimony of petitioner's chief executive officer that, "if [respondent] had published a price for A/P, [petitioner] would have followed that price as long as it would have allowed his company a profit." (App. 64.)

2. Award of Damages

The district court computed petitioner's damages on the premise that any and all injury which petitioner had sustained derived from what it supposed to be respondent's unlawfully low, "predatory," bids.[n] The Court hypothesized an industry structure of "price leadership oligopoly" or "duopoly" (App. 98) under which petitioner would "follow" respondent's price.

[n] Petitioner offered no separate proof of injury or damages sustained in consequence of respondent's alleged attempt to monopolize, successful monopolization and price discrimination under the Robinson-Patman Act. All of petitioner's damages proof was directed to the hypothesis that petitioner would have followed respondent's unlawfully low bids and that petitioner's revenues would have been higher, and it would have won more bids, had it been able to follow respondent's bid prices at a higher level. Thus, petitioner wrote in its brief to the court of appeals,

> "All three violations related to the obtaining or retaining of the monopoly, and to the unreasonably low price and volume of sales [petitioner] received. To measure the damages, the [district court] simply compared that low price and low volume with what they would have been in a market untainted by [respondent's] unlawful conduct." (Brief of Plaintiff-Appellee, p. 84.)

increased its 1971 market share to 56 percent from its 1970 share of 22 percent. (*See* p. 6, n.6, *supra*.) Had petitioner won another major bid in 1971, it would have possessed a market share that, in respondent's hands, the district court regarded as monopolistic.

Third, the evidence establishes that entry into the A/P industry is quite a simple and relatively inexpensive proposition for any chemical company and that after it ceased A/P production, Hooker "mothballed" its plant and remained ready to reenter if circumstances warranted. (App. 28.) Nor are there other barriers to entry such as restricted access to raw materials, restraints arising from leases or other agreements, or need to insure against patent infringing. Barriers of those sorts almost always accompany genuine monopoly. *See, e.g., American Tobacco Co.* v. *United States, supra; United States* v. *Aluminum Company of America, supra; United States* v. *Grinnell Corp., supra; United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Fourth, petitioner would have to explain how respondent could wield "monopoly power" in a market that the district court itself termed a "buyer's market" (App. 107), in which the major purchasers of A/P possessed and constantly exerted power to depress the price of A/P. Finally, assuming that it prevailed on each of the foregoing points, petitioner would have to demonstrate that the principles enunciated in cases such as *Union Leader Corp.* v. *Newspapers of New England, Inc., supra*, are either inapplicable or erroneous.

There is an additional reason why rejection of petitioner's attempt to monopolize allegations disposed

to destroy competition or create a monopoly." (App. B 59.[1]) Finally, the Court of Appeals erroneously adopted as the standard for predatory pricing in a Section 2 Sherman Act attempted monopoly case (and because of its first error, in a monopolization case) the fiction of marginal cost pricing.

In its brief in opposition, Respondent does not engage these issues. Rather, Respondent rests its entire case on the assertion that the judgment of the trial court in its totality is based on the premise that Respondent was obligated to engage in price leadership to avoid liability under the antitrust laws.[2]

This assertion, which underlies Respondent's entire brief, is false.

By failing to engage the issues that were presented by the trial court's exhaustive findings, and that are therefore presented by the ruling of the Court of Appeals reversing the trial court judgment, Respondent, like the Court of Appeals, has conceded those findings and left them intact. By placing the case in such a posture, Respondent has made clear that it is the opinions of the trial court, rather than the opinion of the Court of Appeals, that is at issue on this Petition for Certiorari.

It is important to an understanding of Respondent's error that Judge Hoffman wrote *two separate opinions*. The first, filed March 4, 1974, found that Respondent violated Section 2 of the Sherman Act by monopolizing and attempting to monopolize the ammonium perchlorate (A/P) market, and the Robinson-Patman Act by discriminating in price in sales of A/P. The second opinion, rendered almost two years later after a separate damage trial, and after denial of an interlocutory appeal by the Court of Ap-

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1. "App. B" refers to the liability opinion of the district court, Appendix B to the Petition.

2. Respondent's Brief also notes that the order of the Court of Appeals denying Petitioner's timely Petition for Rehearing is not included in the Appendix. That order was filed with the Court.

These "other activities" are summarized in Point I at page 5, infra.

The Court of Appeals dealt with this simple and straight-forward finding of the trial court by grossly mis-stating it, and then apparently overturning it without reference to the "clearly erroneous" standard of review imposed by Rule 52(a), Fed.R.Civ. Pro.[3]

> In the circumstances of the industry, the trial court found AMPOT's prices alone were not a sufficient basis for an inference of predatory intent.[4]
>
> * * *
>
> The court's holding that AMPOT's conduct was predatory is based on its effect as a competitor rather than its effect on competition. . . .
>
> Predatory pricing is the essential unfair means alleged in this case. The other practices employed by AMPOT inflicted no independent harm. They were merely auxiliaries to its general pricing policy and indicate nothing more than an intent that its pricing succeed in excluding PE from the market. . . .
>
> If the trial court correctly found AMPOT's pricing was not predatory in itself, we do not believe AMPOT can be found guilty of violating the Sherman Act.
>
> * * *
>
> The evidence shows this is not a case of short-run price cutting designed to secure monopoly profits in the long run. . . . There is nothing in the record to warrant a finding that AMPOT engaged in predatory pricing. (App. A, pp. 6, 10-11, 14.)

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3. In the Petition for Writ of Certiorari, Petitioner adverted to the violation of Rule 52(a) by the Court of Appeals, but did not make an issue of it. (Petition, pp. 5, 13, 23, 25, 29.) Thus, the Court of Appeals' violation of Rule 52(a) is a substantial ground of error available to Petitioner although not previously presented.

4. This statement is obviously wrong, as the above-quoted language of the trial court amply demonstrates.

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This market structure, the court explained, would "make prices higher after both firms realized their mutuality of interest and perceived the pricing and market share division expectations of each other." (App. 106.) The court concluded that "price leadership" could not have taken hold until 1967 (App. 108-09) and awarded damages for the period 1967-70 on the assumption that prices would have equalled respondent's fully allocated cost plus a small profit margin at a production level under which respondent would have enjoyed 65 percent of the market and petitioner the remaining 35 percent. (App. 112-14.)

C. The Opinion of the Court of Appeals

Finding "fundamental flaws in the trial court's application of the Sherman Act" (App. 10), the court of appeals reversed. Construing the unique circumstances accounting for the plight of producers in the A/P industry, the court criticized the "excessive concern with preventing the appearance of monopoly" and the "obeisance of the realities of the market situation" (App. 10, n. 6) inherent in the district court's holding that "the only way [respondent] could have avoided violating the antitrust laws was to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival." (App. 10.)[*]

[*] The court observed that the market behavior dictated by the district court's failure to accord due weight to the unique circumstances of the A/P industry—its requirement that respondent attempt to institute a "price leadership oligopoly" market structure —also offends the policies of the antitrust laws. Thus, it noted that "artificial pricing" is often evidence of illegal price fixing and that, in this case, "price leadership" would be a euphemism for shared monopoly under which each firm would restrict its output in order to raise prices. (App. 13.)

25

also of its monopolization claims. Petitioner's proof of injury and damages rested entirely on evidence of what its revenues as a "price follower" would have been had respondent not engaged in "below cost" bidding; the court of appeals recognized that respondent's other practices "inflicted no independent harm." (App. 11; *see* p. 10, *supra*.) If respondent's bidding practices were lawful or—as petitioner contends—also offends the policies of the antitrust laws. Thus, it noted that "artificial pricing" is often evidence of illegal price fixing and that, in this case, "price leadership" would be a euphemism for shared monopoly under which each firm would restrict its output in order to raise prices. (App. 13.)

III.

THE COURT OF APPEALS ADOPTED NO "CONCLUSIVE PRESUMPTION" GOVERNING THE LAWFULNESS OF PRICING PRACTICES.

On the sheer fiction that the court of appeals embraced a rule that prices above marginal or variable cost should be "conclusively presumed lawful," petitioner constructs its argument that the court of appeals erred in faulting the district court's holding that pricing below "fully allocated" cost is itself "convincing evidence" of monopolistic intent.[*] Petitioner contends

[*] Petitioner refers to "the Court of Appeals' flat adoption of *conclusively* legal marginal cost pricing in this case" (Pet., p. 34); to the "Court of Appeals' adoption of the conclusive legality of marginal cost pricing" (*id.*, p. 38), and to the court's "holding" that "such pricing practices [are] conclusively lawful." (*Id.*)

3

peals, was filed on February 2, 1976, and dealt *exclusively* with the damage issues.

In its brief in opposition, Respondent quotes interchangeably and out of context from these two separate opinions, as if they dealt with the same issues—as if both dealt with the issues of liability presented by the Petition. Such treatment of the trial court opinions is unfair to Judge Hoffman and potentially misleading to this Court. It is only the first of the district court's opinions, that dealing with the liability issues, that is relevant to the issues presented in the Petition.

Respondent's Brief in Opposition is premised from the beginning and throughout on a flat misstatement of what Judge Hoffman did in deciding this case. Respondent falsely claims that Judge Hoffman held that Respondent specifically intended to monopolize the A/P market *because* it failed "to attempt the creation of a 'price leadership oligopoly' under which each producer would enjoy 'a relatively stable price and a division of the market.'" (Res. Br. 9.) Respondent falsely claims that Judge Hoffman held that Respondent willfully acquired and maintained monopoly power in the A/P market on the same basis.

Judge Hoffman's two separate opinions are separately attached to the Petition as Appendices B and C. In the liability opinion, Appendix B, the district judge held:

> In order to establish such an attempt [to monopolize], the [Petitioner] must prove that the [Respondent] had the specific intent to destroy competition or create a monopoly, that the [Respondent] took overt acts pursuant to this intent, and that a dangerous probability of monopoly existed. . . .
>
> In the case at bar, the primary question is whether [Respondent] possessed the requisite specific intent. . . . We have carefully weighed the evidence and have concluded that such conduct [from which the wrongful intent can be inferred] is present.
>
> As is claimed by [Petitioner] there is ample evidence of predatory intent." (App. B 59-60.)

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The findings of the trial court are those of one of the most distinguished district judges in the nation. Judge Hoffman was designated by the Chief Justice to try this case. Judge Hoffman studied the case for nearly a full year after the liability trial before rendering his Opinion as to liability. It is outrageous that the Court of Appeals permitted itself to be seduced into a patent misconstruction and reversal of Judge Hoffman's findings of specific intent to monopolize (on the attempted monopoly claim) and willful maintenance of monopoly power (on the monopoly claim).

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), involved substantially less abuse of Rule 52(a) by the appellate court. Yet the Court granted certiorari in that case,

> to consider among other things the question whether the Court of Appeals properly discharged its appellate function under Rule 52(a) of the Federal Rules of Civil Procedure, which specifies that the findings of fact made by a District Judge sitting without a jury are not to be set aside unless "clearly erroneous." (395 U.S. at 108.)

In reviewing the actions of the appellate court in *Hazeltine*, Mr. Justice White, for a virtually unanimous court, held that the strictures of Rule 52(a) had been violated:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." (395 U.S. at 123.)

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The court of appeals explained that the trial court erred in equating what it had termed respondent's "below-cost" bids—and respondent's knowledge of the likely impact on petitioner if those bids were successful—with the specific intent to monopolize that might be inferred from similar conduct in a healthy industry containing a number of competitors. (App. 10, n.6.) Thus, it stressed that respondent's bid prices reflected "rational, competitive behavior" in an industry plotted with productive capacity and inhabited by powerful buyers. (App. 15.) And since, in the distressed twofirm industry, competitive bidding practices and related conduct of necessity reflected "an intent that [respondent's] pricing augured in excluding [petitioner] from the market," (App. 11), the court observed that "'intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of section 2 [of the Sherman Act].'" (*Id.*, *quoting*, *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 594 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).)

Reviewing the other conduct the trial court thought symbolic of "predatory" intent, the court of appeals discerned nothing improper or unusual, nothing that inflicted harm on petitioner (App. 11) and "nothing in the record to warrant a finding that [respondent] engaged in predatory pricing." (App. 15.) Of the district court's surmise that respondent should have known it could have raised its bids, the court of appeals pointed out that the hypothetical "non-predatory" prices on which the district court computed damages "were on the average higher than the forward prices which had provoked strenuous objections from the powerful A/P

buyers." (App. 9-10.) Because the district court—at petitioner's urging—had built its conclusion that respondent monopolized the A/P industry on the identical bidding behavior that it supposed to embody an unlawful attempt to monopolize, the court of appeals regarded its analysis of the pricing issues to be dispositive also of the monopolization issues. It said, "[t]he distinctions between the two offenses are not relevant to our decision because the same conduct was relied upon to establish both the attempt and the willful maintenance of monopoly. The fundamental issue is whether [respondent] engaged in predatory pricecutting." (App. 2-3.)

REASONS FOR DENYING THE WRIT

The issues petitioner tenders for review are not fairly presented by this case. Petitioner builds its questions presented on a palpable misreading of the court of appeals' opinion. It attributes to the court of appeals findings of fact which that court never accepted. It distorts the district court's own fact findings and attempts to endow the distortions with legitimacy by citing controverted evidence concerning which no court has made a finding. Most importantly, it does not so much as acknowledge the single issue of law that *is* squarely presented by this case. That issue is the proposition, which petitioner successfully urged on the district court, that regardless of the circumstances of the A/P industry, Section 2 of the Sherman Act precluded respondent from engaging in any form of competitive conduct inconsistent with the creation of a "price leadership oligopoly" under which both producers would enjoy stable market shares at relatively high prices.

that the court below was impelled into error on this score by an influential recent article, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L.Rev. 697 (1975).

Areeda and Turner, as the court of appeals recognized (App. 14), propose that prices above a firm's marginal, or average variable, costs of production be "conclusively presumed lawful." 88 Harv.L.Rev. at 709, 733. But the court of appeals adopted no such hard-and-fast rule. The court's discussion of the point is clear. It observed, "[w]e believe that evidence of marginal cost or average variable cost is extremely beneficial in establishing a case of monopolization through predatory pricing." (App. 14.) It expressly stated that "we do not intend to adopt a solely cost-based test . . ." (App. 15) and engaged in a careful review of the district court's opinion. And it rejected the district court's belief that respondent's "below cost" pricing, rather than "price leadership" based on fully allocated costs was "convincing evidence" of specific intent to monopolize. (*See*, pp. 13-15, 16-17, *supra*.) Indeed, it is petitioner that contends for a conclusive presumption when it repeats its argument that this Court's opinion in *Utah Pie* commands that, regardless of the circumstances affecting a particular industry, "prolonged sales below full cost constitutes evidence of predatory intent . . ." (Pet., p. 36.)[*]

[*] Petitioner would draw its own "conclusive presumption" that sales below full cost reflect monopolistic intent from several additional Robinson-Patman Act price discrimination cases, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 118 (1954); National Dairy Products Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965), *vacated and remanded*, 384 U.S. 883 (1966); *Forster* Mfg. Co. v. FTC, 335 . 2d 47, 58 (1st Cir. 1964), *cert. denied*, 380 U.S.

Petitioner also notes that two other courts of appeal have recognized the usefulness of the Areeda and Turner analysis—the Fifth Circuit in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (1975), *cert. denied*, 424 U.S. 943 (1976), and the Ninth Circuit in *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (1976), *cert. denied*, ——— U.S. ——— (No. 76-756, January 24, 1977). Like the court below, neither the Fifth Circuit nor the Ninth Circuit has presumed conclusively that marginal or variable cost pricing is lawful without regard to surrounding circumstances. There is no basis for petitioner's unexplained assertion that this emerging consensus, which recognizes the significance of a firm's production costs in any balanced analysis of all the facts and circumstances surrounding a firm's pricing practices, has "created a serious conflict among the Circuits." (Pet., p. 34.)

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906 (1965); Maryland Baking Co. v. FTC, 343 F.2d 716, 718 (4th Cir. 1957); E. B. Muller & Co. v. FTC, 142 F.2d 511, 517 (6th Cir. 1944); Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 236 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929). (See Pet., p. 34.) None of the cases so much as hints at such a proposition. Each underscores the importance of careful analysis of the surrounding facts and circumstances in determining the lawfulness of pricing practices under the Robinson-Patman Act. So too, this Court's decisions in Illinois Brick Co. v. State of Illinois, No. 76-404 (decided June 9, 1977), and Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), do not conflict with the decision below. Those decisions, which deal with the "passing on" defense in treble damages litigation, bear no relation to the issues presented by this case. And the general principle that petitioner draws from the cases—that the "economist's hypothetical model" provides no basis for ignoring "real-world facts" (Pet., p. 35)—certainly does not mean that the court of appeals' insistence that all relevant factors be assessed, but petitioner's view that pricing below fully allocated cost is the conclusive measure of monopolistic intent.

Judge Hoffman then reviewed the facts upon which his finding of fact that "there is ample evidence of predatory intent" was based:

> (1) "The most convincing evidence is the fact that all of [Respondent's] sales during and for some years prior to the four year and nine month period here were below cost." (App. B-60.)
>
> (2) "[Respondent's] forward pricing activities are particularly telling since, as [Petitioner] claims, [Respondent's] forward prices were raised when [Petitioner] appeared on the verge of bankruptcy and lowered when it looked as if [Petitioner] would remain a viable competitor." (App. B-61.)
>
> (3) "The extensive surveillance is also indicative of predatory intent although, standing alone, it would not justify our decision." (App. B 61.)
>
> (4) "Additionally, we feel that [Respondent's] extensive interest concerning [Petitioner's] SBA status is symbolic of the company's efforts to drive [Petitioner] from the market." (App. B-61.)
>
> (5) "The alleged 'dumping' incident must also be considered since it involved one of [Respondent's] vice-presidents and the company's product manager." (App. B 62.)
>
> (6) "Finally, [Respondent's] predictions of market sales indicate that their company's goal was to capture the entire A/P market." (App. B-62.)

Pages 59 through 62 of Appendix B, Judge Hoffman's liability opinion, contain his findings of fact on the issue of specific intent. Those pages may be searched in vain for the words "price leadership" or for any other reference suggesting that Judge Hoffman predicated his finding of specific intent in any part on the economic concept of price leadership, as distinguished from Respondent's affirmative misconduct therein detailed. Similarly, one can search Appendix B pages 31 through 50, wherein Respondent's misconduct is treated in greater detail as a discussion of the evidence.

Nowhere is "price leadership" mentioned, or even implied.

Judge Hoffman's findings of Respondent's specific intent to monopolize were properly regarded by him as conclusive on the less strict monopolization issue of willful acquisition and maintenance of monopoly power:

> Since we have previously ruled that there was the specific intent required to establish a monopoly, we feel certain that, if monopoly power did exist, it was willfully acquired and maintained. (App. B 65.)

This finding *is* likewise unrelated in any way to notions of price leadership.

The only reference to price leadership contained in the liability opinion is oblique, and is found at Appendix B pages 64-65. There Judge Hoffman held that Petitioner was obliged by its circumstances to follow a reasonable and Respondent set one, and that Petitioner would have done so. This finding reinforced the district judge's conclusion that Respondent possessed monopoly power over price. The sole relevance of this finding, in context, is to the issue whether Respondent had power over price.

In fact, the first explicit reference to price leadership by the district court is to be found in its *damage opinion*. In introducing that opinion, Judge Hoffman stated:

> In that [liability] opinion this Court concluded that [Respondent] had violated the Sherman and Robinson-Patman Acts. The sole remaining issue is the amount of damages to which [Petitioner] is entitled. (App. C 95.)

After meticulous analysis, Judge Hoffman concluded that absent Respondent's unlawful conduct, a price leadership type of pricing could and would have existed in the ammonium perchlorate industry. (App. C 102.)

It is therefore absolutely clear that Judge Hoffman did not hold that Respondent was obliged to engage in a price leadership

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Yoder Bros. Inc. v. California-Florida *Plant* Corp., 537 F.2d 1347 (5th Cir. 1976) 4

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 11

In this case the Court of Appeals did not consider, and plainly violated, Rule 52(a). Judge Hoffman's findings of specific intent and willful acquisition and maintenance of monopoly power were not clearly erroneous. They were amply supported by the record.

CONCLUSION

For the reasons set forth herein, as well as for the reasons urged in the Petition for Writ of Certiorari originally filed, review of the incorrect and misplaced decision of the Court of Appeals by this Court is warranted. The decision of the Court of Appeals is so wrong that this Court would be fully justified in granting certiorari and summarily reversing and reinstating the judgment of the trial court.

Dated October 27, 1977.

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CERTIFICATE OF COUNSEL

Pursuant to Rule 33, Subdivision 2, of the Supreme Court Rules, the undersigned, one of counsel for Petitioner, hereby certifies that the within Petition for Rehearing is presented in good faith and not for delay, and that the Petition for Rehearing states grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to Petitioner although not previously presented. As to Point III in the within Petition for Rehearing, this Certificate is subject to the notation in Note 3 at page 10 of the Petition that the standards of Rule 52(a), Federal Rules of Civil Procedure, were adverted to in the original Petition for Writ of Certiorari.

Dated October 27, 1977.

s/ C. Keith Rooker
C. Keith Rooker

no market other than the Federal Government purchasing directly, or indirectly through its contractors. Prices steadily declined.[3]

A key factor in the decline of bid prices was the practices of the large government contractors that purchased A/P for use in the missiles and rockets they built. The three largest purchasers themselves consumed more than 55 percent of the A/P manufactured during most of the years relevant to this case, and consciously used their "buyers' market" power to exploit the A/P producers' distress. These "Big Three" purchasers in particular succeeded in manipulating the blind competitive bidding procedures governing procurement of A/P:[4] they invited bids covering all their needs for months and even years at a time, so that on a single bid a substantial share of all A/P demand for a year or more could be won or lost; they solicited "rebids" if they were not satisfied with the first round; they would "negotiate" with one or more low bidders, advising the producers to "sharpen their pencils;" and

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[3] From a price of 32-35 cents per pound in 1961, the price fell beneath 20 cents in 1964, when petitioner bid for a major procurement at 19.25 cents. In 1965, the price declined to 16.40 cents when respondent won a large contract at that bid. Prices dropped to their nadir in early 1966 when petitioner bid 14.92 cents and secured a large procurement. Between 1966 and 1970, the period during which petitioner alleged that respondent unlawfully depressed bid prices, they gradually increased within the range of 15 to 20 cents, with the majority of sales being made at prices at or under 18.25 cents.

[4] Except for Longhorn Army Ammunition Plant, which publicly opened A/P bids, the major buyers of A/P did not disclose the price of the low bid winning each procurement. As to each procurement, therefore, the bidder knew only its own bid and whether it was successful. The A/P purchasers, however, regularly exchanged A/P price information. (*See* J.A. 1809.)

occasionally they even succeeded in persuading the low bidder—who did not know what his competitors had bid—to underbid himself. The district court found these practices to be "unethical if not unlawful." (App. 60.)

During 1965-67, Hooker and Pennwalt, which foresaw no improvement in A/P prices, withdrew from the industry. But demand for A/P remained so slack in the years that followed that petitioner and respondent each possessed enough productive capacity to satisfy substantially all the demand for A/P.[5] Except when specifications or lack of qualification precluded use of one producer's A/P, differences between competing bids of but a fraction of a penny per pound would determine which firm would win a major procurement. And, because the cost of producing A/P is highly volume-responsive and capacity was so underutilized, each producer knew that increased production volume would sharply reduce its unit costs of producing A/P.

Respondent bid with the intention of winning all possible business. Its bids always exceeded its average variable, or out-of-pocket, costs of producing A/P so that it was better off by winning procurements at its bid prices than it would have been either by shutting down its plant or by foregoing the procurements for which it bid. A price of 15 cents per pound—the lowest respondent ever bid—covered all its costs except approximately one half of plant and equipment depreciation. Respondent knew that petitioner's precarious financial structure, which had been built on the expecta-

[5] During 1966-70, the industry operated at less than half its capacity of 50 million pounds per year, of which petitioner's capacity was 20 million and respondent's 30 million pounds.

tion that the A/P industry would expand, probably could not endure if petitioner did not obtain business at prices higher than those prevailing.

During the period 1966-70, respondent accounted for about 70 percent of all A/P produced and sold in the United States, with annual shares ranging between 53.5 and 88 percent.[6] In 1971, respondent notified the Department of Defense of the likelihood that it would cease production of A/P upon the upcoming expiration of the 10-year "National Security Clause" of the contract under which it had purchased A/P manufacturing facilities from the Navy. That clause required respondent to maintain the plant in operational status. Concerned, in the interests of national defense, that there remain two sources of A/P, the Government instituted a procurement allocation program designed to sustain both A/P producers at higher prices.

B. The District Court's Opinions

There were separate trials of the issues of liability and damages. After trial of the liability issues, the district court held that respondent violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by attempting to monopolize the manufacture and sale of A/P in the United States, and by actually monopolizing the production and sale of A/P within that market; the court also found that respondent violated the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling relatively small amounts of A/P in accordance with a schedule of prices

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[6] In late 1970, petitioner's 15-cent bid won a "winner-take-all" procurement consisting of the entire requirements of one major manufacturer; accordingly, petitioner held 56 percent of A/P sales in the United States during 1971 and respondent's share fell to 44 percent. (J.A. 4265-78, 4753-54.)

that exceeded the prices at which respondent bid for large procurements. (App. 19-92.) After trial on the issues of damages, the district court issued an opinion explaining the basis of its award to petitioner of $4,590,594 in treble damages and attorneys' fees of $528,500. (App. 93-132.)

1. Attempt to Monopolize

The district court concluded that respondent attempted to monopolize the A/P industry by inferring specific intent to monopolize from respondent's submission of bids at prices insufficient to cover the fully-allocated costs[7] of manufacturing A/P, accompanied by (1) knowledge of petitioner's precarious financial condition and (2) conduct attesting to respondent's intention to win all possible business. The court found that the "most convincing evidence" of respondent's unlawful intent was its "below cost" sales, by which it meant below fully-allocated costs. It added that "it does not take a great deal of evidence to prove this intent when a company has sold below cost." (App. 60.)

Acknowledging that respondent was not the first firm to bid under 20 cents or under 15 cents—because petitioner had been first—the court observed that respondent knew when it bid 15 cents on a major procurement in 1965 that petitioner probably could not survive if that price level were maintained. (App. 61.)[8]

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[7] The district court defined "fully-allocated cost" as "[t]he full cost of manufacturing and selling the product" (App. 33, n.7), which includes all fixed and variable costs such as depreciation, taxes, insurance, general and administrative expenses, overhead, and interest on short and long-term debt. The court of appeals referred to the fully allocated cost per unit of output as the "average total cost." (App. 5, n.2.) *See also,* Petition, p. 9.

[8] The court elsewhere found that prices did not become "predatory" until 1967. (App. 108-09.)

The court then said that during 1968, petitioner was bidding 2-3 cents per pound more than respondent, and losing "almost all major bids;" it inferred from this that "realities of the marketplace are such that [respondent] must have known that it could bid higher." (App. 61.) The court also observed that respondent's "forward pricing activities"—under which A/P producers submitted long-range price projections (not bids) at the request of A/P purchasers—were "particularly telling" because the "forward prices" seemed to vary with petitioner's financial condition. (*Id.*)[9]

Finally, the court took special note of petitioner's contention that respondent "desired to obtain as much of the existing A/P business as possible" (App. 33) and concluded that it demonstrated what it supposed to be an unlawful intention not to "share the market" with petitioner. (App. 62.) The court specifically noted that petitioner would have "followed" respondent's prices at profitable levels, had the prices been published. (App. 64-65.)

And the court explained that, in its view, "there were three possible outcomes of the market conditions" affecting the A/P industry during the years 1966-70:

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[9] The district court mentioned three additional circumstances it thought symbolic of what it termed respondent's "predatory intent": (1) respondent's "extensive surveillance" of petitioner, whose plant was located virtually within sight of respondent's in Henderson, Nevada; (2) respondent's filing of meritorious administrative protests challenging petitioner's acquisition of "small business" status that would have conferred on petitioner a preference in receiving procurements; and (3) an incident, disavowed by respondent and thus never resulting in a sale, in which one of respondent's employees had suggested to a major purchaser that A/P might be available at a price of 9-10 cents per pound. (App. 61-62.)

"1. Defendants could decide that they would recoup the losses of a price war by monopoly pricing and could actively pursue the acquisition of a monopoly.

2. Price leadership oligopoly could be attempted and fail, resulting in a price war with eventual acquisition of a monopoly by defendants because of defendants' superior financial resources.

3. Price leadership oligopoly could be attempted and succeed with a relatively stable price and a division of the market." (App. 99.)

The district court therefore supposed that respondent was legally obliged to refrain from a "price war"—which by definition was the unlawful means to achieving monopoly—and was instead bound to attempt the creation of a "price leadership oligopoly" under which each producer would enjoy "a relatively stable price and a division of the market." (*Id.*)

2. Monopolization

The district court built its conclusion that respondent monopolized A/P production upon its determination that respondent had attempted to monopolize the industry. Because respondent had been found to have attempted to monopolize, the district court observed that "if monopoly power did exist, it was willfully acquired and maintained." (App. 63.) Turning, then, to whether respondent possessed monopoly power, the court concluded that decisions of this Court warranted holding that, during the five years 1966-70, respondent's bare percentage market share of A/P sales required the inference that it possessed monopoly power during three years, and strongly suggested the same

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-118

PACIFIC ENGINEERING & PRODUCTION CO. OF NEVADA,
Petitioner,

v.

KERR-McGEE CORPORATION AND KERR-McGEE CHEMICAL CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1) [1] is reported at 551 F.2d 790. The order of the court of appeals denying petitioner's request for rehearing en banc is not reported and is not included in petitioner's Appendix. The opinions of the United States District Court for the District of Utah (Hon. Walter E. Hoffman sitting by special designation) (1) holding that

[1] All references to the Appendix, "(App. ——)," are to the Appendix to the Petition. References to "(J.A. ——)," are to the Joint Appendix in the court below.

respondents committed violations of the antitrust laws (App. 19) and (2) awarding petitioner damages for such violations (App. 93) are not officially reported.

QUESTION PRESENTED

Petitioner and respondent[2] own and operate the only two plants in the United States manufacturing ammonium perchlorate ("A/P"), a chemical compound whose only significant use is as an oxidizer in solid fuel propellants powering rockets and missiles. Beginning in the mid-1960's, demand for solid fuel propellants declined so sharply that petitioner and respondent each possessed sufficient productive capacity to satisfy substantially all demand for A/P. In consequence, the price of A/P, which was established by blind competitive bidding procedures governed by procurement regulations of the Department of Defense, declined sharply. In the following years, petitioner and respondent bid at prices they hoped would win each procurement contract; each knew that, if its bid were the low bid, the business would almost surely be denied its competitor.

Respondent also knew that petitioner was on the verge of bankruptcy. But respondent's bids always exceeded its direct production costs, contributing to the fixed costs of its "sunk" capital investment and generating cash flow, so that respondent would be bet-

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[2] The courts below referred to respondents Kerr-McGee Corp. and Kerr-McGee Chemical Corp. collectively as "AMPOT," an abbreviation for American Potash and Chemical Corp., which was acquired by Kerr-McGee Corp. on December 31, 1967, and consolidated with Kerr-McGee Chemical Corp. in October 1970. Like petitioner, we refer to both respondents as "respondent."

ter off by winning each bid at its bid price than by foregoing the business.

The single question presented is whether Section 2 of the Sherman Act requires that, in the circumstances affecting the A/P industry, the "larger" or "stronger" competitor must bid for procurements at price levels exceeding its full fixed and variable production costs in order to institute a "price leadership oligopoly" (App. 99) under which the smaller competitor would "follow" the leader's higher prices, and each competitor would receive a relatively stable market share at remunerative prices.

STATEMENT

A. Factual Background

In the late 1950's and early 1960's, the projected demand for A/P as a propellant for military missiles and rockets, and for similar applications in the NASA space program, encouraged rapid and substantial expansion in the nation's A/P manufacturing capacity. While only one firm, respondent's predecessor, had manufactured A/P prior to 1958, three more firms had entered the market by 1961. One was petitioner and the other two entrants were large chemical manufacturers, Hooker Chemical Company and Pennwalt Chemical Corp.

Three years later, by late 1963, the industry's prospects were as gloomy as they once had been bright. A combination of factors—including the diversion of defense appropriations to the nation's growing commitment in Vietnam and NASA's decision not to use solid fuel propellants in the civilian space program—curtailed demand for A/P, for which there was virtually

The decision of the court of appeals focused on the district court's fundamental error. It rejected the trial court's holding that Section 2 of the Sherman Act obliged respondent to refrain from price competition and required instead that it bid at prices designed to institute "price leadership oligopoly" under which both competitors would receive a stable share of A/P sales at remunerative prices. The court of appeals therefore had no occasion to resolve the questions petitioner raises, much less did it resolve those questions in the manner petitioner contends it did.

The court of appeals correctly rejected petitioner's "price leadership" theory and properly reversed the district court's judgment, which was built on that theory. Petitioner does not challenge that decisive aspect of the court of appeals' decision. The decision does not conflict with the decision of any other court of appeals and faithfully follows the principles stated by this Court in analogous cases.

The decision is the product of the unique and extraordinary circumstances of the A/P industry during 1966-70 and presents no issues of general importance calling for resolution by this Court.

Following the same order of analysis as the district court, we first address petitioner's erroneous contention that the court of appeals held that antitrust plaintiffs must prove "predatory conduct" in addition to a specific intent to monopolize (Pet., pp. 22-32); second, we refute the assertion that the court of appeals held that but for a showing of specific intent to monopolize it would have held that respondent monopolized the A/P industry (Pet., pp. 14-22); and third, we disprove petitioner's contention that the court of appeals

"conclusively presumed" the lawfulness of prices exceeding marginal or variable costs (Pet., pp. 32-39).

I.

THE COURT OF APPEALS DID NOT REQUIRE THAT PLAINTIFF PROVE PREDATORY CONDUCT IN ORDER TO ESTABLISH A SPECIFIC INTENT TO MONOPOLIZE.

Because it rejected the district court's conclusion that Section 2 of the Sherman Act obliged respondent to attempt to create a "price leadership" industry structure, the court of appeals never had occasion to reach the question whether an antitrust plaintiff must show "something in addition to specific intent . . . such as predatory or sinister conduct." (Pet., p. 22.)

A.

The Court of Appeals Properly Rejected the District Court's Erroneous View of Section 2 of the Sherman Act.

Petitioner does not so much as allude to the theory of "price leadership" it successfully urged on the district court.[12] That theory postulates that, in a distressed market with two beleaguered sellers, the "larger" or "stronger" seller is presumed to have "specific intent to monopolize" if it seeks for itself the limited business available. That presumption attaches because the larger competitor cannot help but know that its own success would spell the failure of the smaller producer. To avoid the prospect of monopoly, the theory holds, the larger competitor must seek to implement an industry

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[12] For example, petitioner's reply brief to the district court on the damages phase of the case says (p. 24): "[I]f [respondent] had operated in the A/P market like a responsible, non-predatory seller, it would have set its price and held it with determination, with [petitioner] following [respondent's] price and both sellers making a reasonable profit."

structure of "price leadership oligopoly" under which, to use the district court's words, each producer would enjoy "a relatively stable price and a division of the market." (App. 99.)

The court of appeals expressly rejected the "trial court's holding [that] the only way [respondent] could have avoided violating the anti-trust laws was to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival." (App. 10.) The court discussed three independent reasons why the district court erred in equating specific intent to monopolize with refusal to engage in "price leadership."

First, it held that the district court improperly concluded that, in the A/P market during 1966-70, bids below fully-allocated cost constitute "convincing evidence" (App. 60) of monopolistic intent and that "it does not take a great deal of evidence to prove this intent when a company has sold below cost." (*Id.*) The court reviewed the district court's key findings that overcapacity, exertion of market power by major purchasers, and desire by each producer to lower its unit costs by expanding output depressed prices and intensified competitive bidding (App. 4-5, 12). It noted that respondent's bids "were always at prices above average variable cost and 'contributed to the company's cash flow.' " (App. 15.) It *rejected* the trial court's finding —if it can be called a finding—that respondent "must have known" it could have raised the price for A/P because "[t]he prices the [district] court found could have been charged . . . were on the average higher than the forward prices which had provoked strenuous objections from the powerful A/P buyers." (App. 9-10.) It reviewed economic authorities confirming the

rationality—indeed, the probability—of variable or marginal cost pricing in circumstances such as those affecting the A/P market. (App. 12-15.) All these factors demonstrated that "[i]n some instances there is no inference to be taken from selling below total cost." (App. 12.) The court of appeals determined that in this case, such pricing reflected "rational, competitive behavior." (App. 15.)

Second, the court rejected the view that respondent's intention to compete vigorously for all possible business, with knowledge of petitioner's financial weakness, was synonymous with specific intent to monopolize the A/P industry.[13] In holding that the Sherman Act does not require price competition to give way to "price leadership" in markets such as the A/P market, the court of appeals embraced Judge Wyzanski's statement of the proposition:

> " '[A] person does not necessarily have an exclusionary intent merely because he foresees that a market is only large enough to permit one successful enterprise, and intends that his enterprise shall be that one and all other enterprises shall fail . . . there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons.' " (App. 11.)

Third, the court of appeals rejected the district court's "price leadership" test of intent to monopolize as contrary to both the letter and spirit of the antitrust laws; it said that "[p]rice leadership is not de-

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[13] The court of appeals (App. 6) and the district court (App. 36) each noted that respondent did not expect to achieve a monopoly if petitioner were forced from the market, because petitioner's production facilities would likely be purchased and operated by one of the major A/P consumers.

sirable competitive conduct." (App. 13.) The court cited cases in which evidence of "[c]onscious parallel pricing" has been held sufficient to establish price fixing, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (*Id.*) [14] And it recognized that price leadership would amount to little more than a shared monopoly that would ensure high A/P prices and the preservation of costly idle capacity. (*Id.*)

B.

The Court of Appeals' Decision Does Not Conflict With Decisions Of This Court or Other Courts of Appeal.

Petitioner cites no case or other authority supporting the district court's equating specific intent to monopolize with respondent's failure to attempt institution of "price leadership." We know of no such authority.

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[14] As the court of appeals recognized (App. 13), other authorities underscore that "price leadership oligopoly" would undermine, rather than foster, the goals of the Sherman Act. The effort of competitors to shield themselves from excesses of supply over demand, and thus to avoid "ruinous" competition by "stabilizing" prices, is flatly inconsistent with the Sherman Act's protection of price competition and "the free play of market forces." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); *see also*, United States v. Container Corporation of America, 393 U.S. 333, 337 (1969).

Furthermore, the Armed Services Procurement Regulations ("ASPR"), 32 C.F.R. §§ 1-100, *et seq.* (1975), governed procurement of A/P by the "Big Three" and other government contractors. The regulations require that evidence that bids or proposals are not "genuinely competitive" must be reported to the Attorney General, and that practices affording an inference of illegal conduct include "collusive bidding, follow-the-leader pricing, rotated low bids, uniform estimating systems, sharing of the business, identical bids, etc." 32 C.F.R. § 1-111.2(a) (1975).

None of the authority that petitioner does cite in support of its second issue presented conflicts with the decision of the court of appeals. Cases endorsing the principle that the trier of fact is in the best position to judge the *mens rea* of witnesses, such as *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949), and *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945), are irrelevant to the reasons why the court of appeals rejected the district court's belief that the Sherman Act obliged respondent to engage in "price leadership." (*See* Pet., p. 30.) Nor can we perceive among the lower federal courts some simmering "confusion and inconsistency concerning whether predatory conduct is a required element for a finding of an attempt to monopolize" (Pet., p. 30, n.13),[15] or the relevance of any supposed confusion to the court of appeals' decision. So too, the principle that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each,"[16] which petitioner quotes twice

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[15] Any "confusion and inconsistency" among the nine recent cases petitioner cites arises from its attempt to lift phrases out of context from the cases and to equate variations in language with conflicts of principle. Each case simply applies, to differing circumstances and contexts, the well-settled rule that a plaintiff alleging an attempt to monopolize must show that the acts of which he complains are accompanied by a specific intent to monopolize and a dangerous probability that the attempt will succeed. *See, e.g.*, United States v. Griffith, 334 U.S. 100, 105-06 (1948); Swift & Co. v. United States, 196 U.S. 375, 396 (1905). The cases reflect differing approaches to the question whether "specific intent to monopolize" may itself be the evidence of "dangerous probability," but that is an issue presented by neither this case nor the petition.

[16] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 691 (8th Cir. 1966).

(Pet., pp. 27, n.11 and 29), does not endorse the district court's belief that the Sherman Act obliged respondent to engage in "price leadership."

Finally, there is no merit to petitioner's assertion that *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), forecloses the court of appeals' decision. (Pet., pp. 26-27.) *Utah Pie* neither supports the district court's "price leadership" test of monopolistic intent nor establishes any presumption of universal applicability holding that sales below fully allocated cost announce an intent to monopolize. This Court observed in *Utah Pie* that a jury was entitled to infer from "persistent unprofitable sales below cost and drastic price cuts themselves discriminatory," 386 U.S. at 696, n.12, the "competitive injury" element of primary-line price discrimination forbidden by the Robinson-Patman Act. It said so with respect to a healthy market suffering none of the structural problems affecting the A/P industry, and whose "drastically declining price structure" could be "attribute[d] to continued or sporadic price discrimination." *Id.* at 703.

By contrast, the district court in this case found that the decline of A/P prices below fully-allocated cost occurred well before the period during which it held respondent should have engaged in "price leadership" (App. 36-37, 108-09), and that the price declines derived from the factors that made the A/P industry a "buyers' market." (App. 107.) That is poles apart from *Utah Pie,* in which price declines originated in price discriminations bearing no relation to supply and demand. The court of appeals was clearly correct in determining that *Utah Pie* does not "establis[h] a definitive standard" (App. 11) under which sales be-

low fully allocated costs establish a specific intent to monopolize in violation of Section 2 of the Sherman Act, regardless of the surrounding circumstances.

II.

THE COURT OF APPEALS DID NOT "IMPLICITLY APPROVE" THE DISTRICT COURT'S CONCLUSION THAT RESPONDENT MONOPOLIZED A/P PRODUCTION.

Petitioner is simply wrong to claim that, "[r]ead in its entirety, the Court of Appeals' opinion implicitly approves the District Court's additional specific findings that Respondent possessed monopoly power to control prices and to exclude competition." (Pet., p. 14.) Rather, the court of appeals held that its rejection of the district court's conclusion that respondent had attempted to monopolize the A/P market also disposed of petitioner's monopolization allegations. Thus the court said that "[t]he distinctions between the two offenses are not relevant to our decision, because the same conduct was relied upon to establish both the attempt and willful maintenance of monopoly" and that the "fundamental issue is whether [respondent] engaged in predatory price cutting." (App. 2-3.) Accordingly, there is no foundation for petitioner's assertion that the court of appeals held that respondent possessed monopoly power but did not violate Section 2 of the Sherman Act because it had no specific intent to monopolize. (Pet., pp. 14-22.)

The reasons why the court of appeals' rejection of petitioner's—and the district court's—"price leadership" test of monopolistic intent disposed also of the monopolization claims appear clearly from the district court's analysis of what it supposed to be respondent's "monopoly power." Although the district court prop-

erly recognized that "[m]onopoly power is the power to control prices or exclude competition" (App. 63, *citing, American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946); *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966)), it based its findings that respondent possessed monopoly power on the identical "price leadership" theory it had embraced in concluding that respondent had attempted to monopolize the A/P industry. Thus, the district court held that respondent's "below cost" competitive bids had demonstrated that it was "responsible for maintaining the depressed prices."[17] (App. 64.) And the district court held that respondent had the power to raise prices in the industry solely on the strength of petitioner's testimony that, if respondent "had published a price for A/P, [petitioner] would have followed that price as long as it would have allowed [it] a profit." (App. 64-65.) Furthermore, the court of appeals rejected the district court's suggestion that respondent "must have known

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[17] The district court also said, "We *feel* the [respondent] used its vast financial resources to subsidize its below cost pricing." (App. 64, emphasis supplied.) The only possible basis for the district court's "feeling" is the assumption that the larger financial resources of respondent would enable it to sustain losses for a longer period of time than could petitioner. But the fact is that there were no cash losses, only bookkeeping losses, since all respondent's costs except a portion of its depreciation were covered. (P. 28, *infra.*) The district court specifically rejected petitioner's contention that Kerr-McGee Corp. conspired with AMPOT or Kerr-McGee Chemical Corp. to finance losses during a "price war." (App. 65-68.)

In recognition of the weaknesses of this aspect of its theory, petitioner no fewer than three times resorts to citations of trial evidence—including irrelevant "renegotiation reports" and casual observations of the district court at trial—in an attempt to suggest that respondent implemented a scheme to cross-subsidize its losses. (Pet., pp. 8, 32, 38-39.)

it could raise prices without affecting its market share" because the powerful A/P buyers themselves forbade the price increases the district court hypothesized. (App. 9-10.)

There are, moreover, other critical obstacles, briefed in the court of appeals but which it did not need to reach, that petitioner would have to overcome to prove its monopolization charge. First, petitioner would have to defend the district court's definition of the relevant market. The court of appeals observed that, "for our purposes, we need not question" the district court's finding as to the relevant market "[h]owever, the fact that [petitioner] was not qualified for certain projects . . . did give [respondent] a significant head start in its market share." (App. 6, n.5.)[18] Second, because the district court drew its inferences concerning monopoly power largely from respondent's market share during some years of the 1966-70 period (App. 63-64), petitioner would have to demonstrate that market share is a meaningful measure of market power in an industry in which one or two competitive bids can account for as much as a third of all annual A/P sales. On the strength of a single bid in 1970, for example, petitioner

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[18] The definition of the relevant product market was one of the most hotly contested issues before both courts below. Because petitioner's A/P was not approved, through qualification testing, for a number of missile and rocket programs, respondent contended that the business for which petitioner was not qualified to compete should be excluded from the "relevant market" because it was outside the "area of effective competition." *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 299, n.5 (1949). The district court ruled against respondent, but recognized that its ruling on the point bore major consequences for the computation of respondent's market share. (App. 52-57.) The district court expressly acknowledged that "this is a close question and our conclusion may be in error." (App. 57.)

Finally, petitioner asserts that "the record contains no evidence whatsoever that Respondent set its prices based upon its marginal costs." (Pet., pp. 37-38.) The assertion is false. In 1966, respondent's financial analyst recommended to management personnel that respondent would be better off producing A/P at 15 cents per pound than by discontinuing production:

> "A review of standard costs for the year 1966 indicates that a price of $300 per ton for ammonium perchlorate (15¢ per pound) reimburses us for all of the direct out-of-pocket costs, all of the costs of sodium perchlorate consumed in the process, and leaves some $87.70 a ton to absorb indirect burdens and fixed charges, totalling $137.61; or, it might be said that the $300 per ton price absorbs all costs direct and indirect except for depreciation and absorbs approximately one-half of the depreciation costs. On an incremental pricing basis, it is more profitable to produce ammonium perchlorate for sale at $300/ton than to discontinue production." (J.A. 4181-83.)

CONCLUSION

The writ should be denied.

Respectfully submitted,

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reply brief

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No. 77-118

PACIFIC ENGINEERING & PRODUCTION CO. OF NEVADA,
Petitioner,

vs.

KERR-McGEE CORPORATION AND
KERR-McGEE CHEMICAL CORPORATION,
Respondents.

Reply Brief for Petitioner

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Reply Brief for Petitioner

In its Petition, Petitioner urged that the Court of Appeals had committed three fatal errors in reversing the judgment of the trial court. First, the Court of Appeals in this monopolization case imposed the same standard of specific, "predatory," "sinister" intent as it imposed in connection with Petitioner's attempted monopoly claim. Second, the Court of Appeals converted the requirement of specific intent in attempted monopoly cases into a requirement that Petitioner prove an intent beyond what the trial judge, Hon. Walter E. Hoffman, by designation, found and what the cases have universally held to be sufficient: an "intent

duopoly *to avoid antitrust liability*. Rather, he found factually that Respondent had engaged in a whole series of acts—none of them involving a failure to engage in price leadership—that evidenced monopoly power and specific intent to monopolize. He found that those were overt acts, and that a dangerous probability of monopoly existed. He found that Respondent in fact had the specific intent to monopolize. He found that Respondent controlled monopoly market shares ranging up to 88 percent. He found that Respondent possessed monopoly power to control price and to exclude competition. He found that this power, and those market shares, were obtained and maintained willfully, and not "by growth or development which was a consequence of a superior product, business accumen or historical accident . . . ." (App. B 62.)

None of these liability findings were related in any way to price leadership, except the finding of monopoly power over price, as indicated.

Only two years after these findings were made, and after a separate damage trial, did the trial court utilize the concept of price leadership. He did so solely for the purpose of assessing damages. Judge Hoffman did not hold or even imply that Respondent was obligated to engage in price leadership. He found that a price leadership duopoly was the *most probable result in a market not skewed by Respondent's monopoly power and intent to destroy Petitioner*, and that this fact provided the necessary basis for measuring Petitioner's damages.[3]

Respondent's Brief in Opposition leaves the case in this posture: There was ample evidence to sustain all of the trial court's findings as outlined above, and as set forth in its liability opinion. The Court of Appeals simply did not hold to the contrary. Respondent does not even argue to the contrary. The failure

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3. The trial judge found that Respondent had the power to raise the A/P price. (App. B 64-65.) The Court of Appeals commented on this finding, but did not reject it. (App. A 9-10.)

of the Court of Appeals to disagree with the critical factual findings made by Judge Hoffman leaves Respondent in a most difficult position. Respondent must take one of three courses. First, it could argue that Judge Hoffman's findings, not rejected by the Court of Appeals, were unsupported by the evidence. This Respondent does not even attempt.

Second, Respondent could acknowledge the findings of the trial court, and the fact that they were not rejected by the Court of Appeals. This would place Respondent in a dilemma: Since the findings of (1) actual monopoly power and (2) specific intent to monopolize were not rejected by the Court of Appeals, that Court necesarily held that (1) even where actual monopoly power exists, the same intent required in attempted monopoly cases must be proven and (2) in attempted monopoly cases, something more than specific intent to create a monopoly or exclude competition must be shown. Either of these holdings obviously warrants full consideration on the merits by this Court. Respondent's refusal to take this second course is therefore understandable.

Finally, Respondent could attempt to persuade this Court that the Court of Appeals did something different than it did. This, in turn, requires Respondent to attempt to persuade the Court that Judge Hoffman did something different than he did.

The third course is the one Respondent has elected. It makes careful examination of Judge Hoffman's liability opinion the focus of the question whether the Petition should be granted. Such analysis will reveal that Judge Hoffman acted as described in this Reply Brief.

Even the most cursory analysis of Judge Hoffman's liability opinion reveals that he held Respondent in violation of the Sherman Act not because Respondent declined to engage in price leadership, but because he found that Respondent was a monopolist, that it possessed monopoly power, and that its conduct satisfied all of the elements of attempted monopolization.

Respondent not only does not engage, it does not even acknowledge, the controlling findings—unrejected by the Court of Appeals—that Respondent had actual monopoly power and also had the specific intent to monopolize. Respondent's avoidance of these dispositive findings neither results in their disintegration nor diminishes the fact that they control the case.

A week-old decision of the Ninth Circuit Court of Appeals is in frontal conflict with the decision of the Tenth Circuit in this case. Petitioner is obliged to call that decision to the attention of the Court.

In *Greyhound Computer Corporation, Inc. v. International Business Machines Corporation,* No. 72-253 (9th Cir., August 17, 1977),[4] the Ninth Circuit, in a case involving both monopolization and attempted monopoly claims, reversed a directed verdict in favor of the defendant. The Ninth Circuit adopted the very position on willful acquisition or maintenance of monopoly power urged by Petitioner but flatly rejected by the Tenth Circuit in this case. The Ninth Circuit described practices far less predatory than those involved in this case:

> These practices were (1) inaugurating the "fixed term plan," (2) eliminating the technological discount, (3) increasing the "multiplier" (a ratio describing the relationship of IBM purchase price to IBM rental price), and (4) "unbundling" (*i.e.*, pricing services separately from the equipment purchase price). (Slip Opinion 11.)

The Ninth Circuit then adopts the following rule of law:

> It is no answer to the charge to say that these practices are not "predatory" but "honestly industrial"—that is, of a kind an ordinary enterprise might utilize with impunity. If the

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4. Because the opinion is not yet published in either the official or the unofficial reporter, Petitioner will notify the Court by letter to the Clerk when the opinion appears in the reporters. Petitioner is prepared to supply any number of copies of the *Greyhound* slip opinion should the Court desire such copies.

> jury concluded IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket. The question is whether the jury could have found that the alleged practices were in fact adopted, and, if so, whether they had the prohibited effect. (Slip Opinion 11.)

Moreover, the Ninth Circuit expressly rejects the argument made by Respondent and adopted by the Court of Appeals that Judge Hoffman was concerned with competitors rather than with competition:

> Failure to establish that IBM had monopoly power in the sales market is not a legal bar to holding that IBM violated the Act by using exclusionary sales tactics to maintain its monopoly power in the lease market. The Sherman Act would be violated if IBM had monopoly power in the sales market and used that power to foreclose competition, gain a competitive advantage, or destroy a competitor in the lease market. (Slip Opinion 18.)

The *Greyhound* opinion harmonizes with the prior decisions of this Court and other courts of appeals, as much as the decisions of the Tenth Circuit in this case and in *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802, are inconsistent with the prior authorities. The *Greyhound* decision underscores the astounding departures of the Tenth Circuit, both in this case and in *Telex*, from the precedents. It emphasizes the conflict among the circuits produced by the decisions of the Tenth Circuit in this case and in *Telex*, as well as the fundamental injustice wrought by its decision in this case.

If the *Greyhound* decision is good law, and it is, and if Judge Hoffman did what he simply said he did, the Petition should be granted and the judgment of the trial court reinstated.

Respectfully submitted this 30th day of August, 1977.

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